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MEMORANDUM
[Confidential]

TO: Mr LP Nzimande, MP and
Mr VG Smith, MP
Co-Chairpersons: Joint Constitutional Review Committee

COPY: Ms PN Tyawa
Acting Secretary to Parliament

Adv EM Phindela
Acting Deputy Secretary: Core Business; and

Ms R Begg
Division Manager: Core Business Support

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 13 November 2017

REF: 137/ 2017/NM
CR 16/53

SUBJECT: Submission by Tshepiso Magano: Request to review sections 9(3)
of the Constitution, 1996

MESSAGE: Please find attached a memorandum for your attention



Adv Z Adhikarie
Chief Legal Adviser



LEGAL OPINION
[Confidential]

TO: Hon LP Nzimande, MP and
Hon VG Smith, MP
Co-Chairpersons: Joint Constitutional Review Committee

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SUBJECT: Submission by Tshepiso Magano: Request to review and amend section 9(3) of the Constitution, 1996

INTRODUCTION

1. Our Office was requested to advise the Constitutional Review Committee (“the Committee”), on a submission by Tshepiso Magano (“submitter”), that proposes the review and amendment of section 9(3) of the Constitution of the RSA, 1996 (“the Constitution”).

OVERVIEW OF SUBMISSION

Equality (Section 9)

2. In summary, the submitter proposes that section 9(3) of the Constitution, should be reviewed and amended to add the term “class” as one of the grounds for discrimination.
3. He does not define the term “class”, however, from the description and in the context of the submission; we understand “class” to refer to a person’s unfortunate socio-economic standing/status, which resulted from past discriminatory laws.
4. He indicates that, “the omission of discrimination on the basis of “class” in section 9(3) of the Constitution, implies that the existing discrimination on the basis of class is fair and this situation must be corrected”.
5. In support of the proposed amendment, the submitter states that discrimination on the basis of “class” deprives citizens, the opportunity to elevate themselves without the assistance of the state and therefore infringes on other relevant constitutional rights.

LEGAL OPINION

Equality (Section 9)

6. Section 9 of the Constitution provides for equality. Section 9(3) of the constitution states that “the state may not **unfairly discriminate** directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
7. Discrimination is to show favour, prejudice or bias for or against a person on any arbitrary ground. There are two kinds of discrimination:
 - fair discrimination; and
 - unfair discrimination.

8. The law sets out grounds on which discrimination can be generally considered fair and these are discrimination based on:
 - affirmative action;
 - inherent requirements of a particular job;
 - compulsory discrimination by law; and
 - productivity.
9. The former paragraph refers to fair discrimination or differentiation (treating people differently on permissible grounds). However, it is unfair discrimination that is inherently unlawful.
10. Section 9(5) of the Constitution states that discrimination on one or more of the grounds listed in section 9(3) of the Constitution is unfair, unless it is established that the discrimination is fair.
11. Section 9(4) of the Constitution states that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of section 9(3). National legislation must be enacted to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Act”) was enacted in line with section 9(4) of the Constitution.
12. It is important to note the relationship between the Constitution and the Act.
13. Section 9 of the Constitution provides that a national statute must be enacted to prevent or prohibit unfair discrimination. The Constitution is primarily intended to regulate the exercise of State power, whereas, statutes are enacted to give effect to basic constitutional rights, amongst others.¹
14. The role of the Act is to implement the basic right contained in section 9 of the Constitution, within the context of promoting equality and preventing or prohibiting unfair discrimination. Therefore, in the context of preventing or

¹ D du Toit; Protection Against Unfair Discrimination In the Workplace: Are the Courts Getting it Right?

prohibiting unfair discrimination, the Act and not the Constitution must be relied on, by persons who allege unfair discrimination.²

15. Section 9 of the Constitution sets out the principle of equality, whereas, the Act on the other hand, extensively provides for promotion of equality and prevention of unfair discrimination. The Act elaborates on the content of the right as enshrined in the Constitution.
16. Section 1 of the Act defines “socio-economic status” as including a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications. The Act prohibits discrimination on the basis of socio-economic status of a person. In *President of South Africa and another v Hugo*³, the Court provided that at the heart of the constitutional prohibition on unfair discrimination was the recognition that all human beings, regardless of their position in society must be accorded equal dignity.
17. In *Hoffmann v South African Airways*⁴, the Constitution Court interpreted the meaning of unfair discrimination in terms of section 9 of the Constitution. The said interpretation was in the context of a refusal by SAA to employ Hoffman because he was HIV-positive. HIV status is not a listed ground of discrimination in section 9(3) of the Constitution. The Court had to determine whether it was prohibited as unfair discrimination, even though not specifically listed, in terms of section 9 of the Constitution. The Court ruled; “the denial of employment by SAA to Hoffman, because he was living with HIV, impaired his dignity and constituted unfair discrimination”.
18. In *S Ndudula & 17 Others v Matrorail*⁵ the Court noted that the Constitution in section 9(3) merely creates a presumption of unfair discrimination when a differentiation is based on listed grounds. In the case of unlisted grounds, the complainant must prove both the differentiation on the unlisted ground has the

² Only when the statute or common law does not protect the right, may a person rely directly on the Constitution. The above mentioned is known as the principle of subsidiarity.

³ 1997 (4) SA 1 (CC) para 41.

⁴ 2000 12 BLLR 1365 (CC) para 72.

⁵ C1012/2015.

potential to impair human dignity or has a similar adverse effect and that indeed had such consequences, which would then constitute unfair discrimination.

19. In *Harksen v Lane*⁶ the Court held that “in order to determine whether the discriminatory provision has impacted on the complainants unfairly, various factors must be considered. These would include, the position of the complainant in society and whether they have suffered in the past, from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not”.
20. Unfair discrimination is prohibited in section 9 of the Constitution. The content of the aforementioned prohibition of unfair discrimination is further detailed in the Act, amongst others. The Act prevents discrimination against a person, whose unfortunate socio-economic status is as a result of past discriminatory laws. In addition, the list of grounds contained in section 9(3) of the Constitution is comprehensive but not complete as indicated by the word “including” and the words “one or more grounds” also indicate that the list is not closed.
21. Furthermore, there is clear judicial precedent on the matter, in that the Courts have ruled, unfair discrimination on a ground that is not listed in section 9(3) of the Constitution, is still considered unfair discrimination; the test is whether unfair discrimination adversely impacted on the person’s human dignity. The social status of the person is amongst the factors that are considered in determining whether the discrimination on a person is unfair.

CONCLUSION

22. In light of the above, there is no justifiable basis in law to amend sections 9(3) of the Constitution. Several Court decisions have already endorsed that the unfortunate socio-economic status (“class”) of a person that resulted from past discriminatory, should be considered in determining whether the discrimination on a person is unfair. Furthermore, the mere fact that a ground is not listed in section 9(3) of the Constitution, does not necessarily mean that it is excluded as a ground for unfair discrimination.

⁶ 1997 (11) BLLR 1489 (CC)

23. We submit that the Constitution and the Act and various judicial decisions sufficiently provide for the submitter's concern.
24. The above notwithstanding, this matter remains one where the Committee may make a policy decision to revisit section 9(3) of the Constitution and extend the listed grounds of discrimination.



Adv Z Adhikarie
Chief Legal Adviser